Bally's Park Place Inc., d/b/a Bally's Atlantic City *and* International Union, United Automobile Aerospace and Agricultural Implement Workers of America, AFL–CIO. Case 4–RC–21286

April 11, 2008

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The National Labor Relations Board has considered objections to an election held June 2 and 3, 2007, and the attached administrative law judge's report recommending disposition of them.[1] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 628 ballots for and 255 ballots against the Petitioner, with 141 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the Employer's exceptions and brief,[2] has adopted the judge's findings and recommendations,[3] and finds that a certification of representative should be issued.

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The judge was sitting as a hearing officer in this representation proceeding. The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

We affirm the judge's denial of the Employer's motion that the judge recuse himself on grounds of prejudice, for the reasons stated by the judge at the hearing. Moreover, some of the Employer's exceptions argue that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's report and the entire record, we are satisfied that the Employer's contentions are without merit.

[3] We affirm the judge's finding that Union Observer Suisung Wong did not signal employees to vote for the Union during the election process. However, we find it unnecessary to rely on the judge's observation that the evidence did not show that Wong intended to point to the "yes" box on the sample ballot; Wong's subjective intent is not relevant.

We agree with the judge that the Employer's evidence concerning the practice in other regional offices regarding the translation of election notices is irrelevant. See *Superior Truss & Panel, Inc*., 334 NLRB 916, 919 (2001). Even assuming that such evidence is relevant, we agree with the judge that the Employer did not prove that the Regional Director's denial of the Employer's request for translation of the notices into 9 foreign languages in this case is inconsistent with agency-wide practice. Compare *Marriot In-Flite Services v. NLRB,* 417 F.2d 563 (5th Cir. 1969), cert. denied 397 U.S. 920 (1970) (enforcement of Board's order denied where regional director failed to follow then-current agencywide policy concerning translation of election ballots).

In the absence of exceptions, we find it unnecessary to consider the judge's analysis of the Union's contention that the Employer should have been precluded from offering evidence supporting its "notice-translation" objection.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union, United Automobile Aerospace and Agricultural Implement Workers of America, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full time and regular part time dealers, keno and simulcast employees employed by the Employer at its Park Place And The Boardwalk, Atlantic City, New Jersey facility, excluding all other employees, cashiers, pit clerks, clerical employees, engineers, guards and supervisors as defined in the Act.

William Slack, Esq., for the General Counsel.
Charles E. Sykes, Esq., of Houston, Texas, *Richard Tartaglio, Esq.,* of Atlantic City, New Jersey, and *Gerald Einsohn, Esq.,* of Las Vegas, Nevada, for the Employer.
William T. Josem, Esq. and *Cassie R. Ehrenberg, Esq.,* of Philadelphia, Pennsylvania, for the Petitioner.

ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS

I. BACKGROUND

DAVID I. GOLDMAN, Administrative Law Judge. Pursuant to Section 9(c) of the National Labor Relations Act (the Act), the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (UAW or Union) filed a representation petition in the above-referenced matter on April 20, 2007.[1] On April 27, the Regional Director for Region 4 of the National Labor Relations Board (the Board) approved a Stipulated Election Agreement, in which the parties agreed to a Board-conducted representation election on June 2 and 3, for the following employees of Bally's Park Place Inc. d/b/a Bally's Atlantic City (Bally's or Employer):

> All full-time and regular part-time dealers, keno and simulcast employees employed by the Employer at its Park Place And The Boardwalk, Atlantic City, NJ facility.[2]

An election in this unit was conducted on June 2 and 3. The tally of ballots showed the following results:

> Approximate number of eligible voters…….1129
> Void Ballots……....6

In the absence of exceptions, we find it unnecessary to consider the judge's analysis of the Union's contention that the Employer should have been precluded from offering evidence supporting its "notice-translation" objection.

[1] All dates hereafter refer to 2007, unless otherwise stated.

[2] Excluded from the bargaining unit under the stipulation were "[a]ll other employees, cashiers, pit clerks, clerical employees, engineers, guards and supervisors as defined in the Act." The stipulation further provided that "[a]ll full-time and regular part-time supervisors casino games/dealers dual rate may vote subject to challenge by the parties."

Votes cast for Petitioner……..628
Votes cast against participating labor organizations…….255
Valid votes counted…….883
Challenged Ballots……..141
Valid votes counted plus challenged ballots……..…1024

After the election, on June 1, Bally's filed objections to the election. On July 12, the Acting Regional Director for Region 4 of the Board ordered a hearing on the objections.[3] I conducted the hearing in Philadelphia, Pennsylvania, August 14–16. The parties filed briefs on September 11. Based on the testimony at the hearing, my assessment of the credibility of the witnesses and their demeanor, the documentary evidence, and the entire record before me, as well as the briefs of the parties, I make the following findings, conclusions, and recommendations.

II. THE OBJECTIONS

Bally's originally filed 10 sequentially-numbered objections. In its posthearing brief (Emp. Br. at 30), Bally's withdrew Objections 3–5 and 7. Accordingly, the following extant objections remain:

> 1. To the refusal of the Regional Director to provide Notice(s) of Election printed in various foreign languages that are spoken by hundreds of eligible voters. The Petitioner did object to the Employer's request that the Notice Election be printed in various foreign languages.[4]
>
> 2. To the conduct of at least one of the Petitioner's Asian Election observers who had a sample ballot visible for Asian voters to see before they obtained their ballots. The Petitioner's Asian observer would point to the Sample Ballot's "Yes" box, which was clearly visible to the Asian voters prior to the casting of their ballots.
>
> 6. Agents, representatives and supporters of the Petitioner threatened, coerced and intim[idated] various eligible voters who did not support the Petitioner.
>
> 8. Agents and representatives of the Petitioner asked eligible voters how they were going to vote prior to the election.
>
> 9. Agents and representatives of the Petitioner threatened eligible voters that if they did not sign a document in support of the Petitioner that they would be the first to go after the Petitioner won the election.
>
> 10. By the above, related and other acts and conduct, the Petitioner's agents, representatives and supporters interfered with the election.

In its brief, Bally's describes (Emp. Br. at 40) Objection 10 as a "catch all objection" and states that "the evidence in support of it has been summarized in this brief." No specific evidence or argument is advanced. Such "catch all" objections lack the specificity contemplated by the Board's rules and must be (and is) overruled. *Smithfield Packing Co.*, 344 NLRB 1, 172 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006); and *Airstream*, 288 NLRB 220, 229 (1988), enfd. in relevant part, 877 F.2d 1291 (6th Cir. 1989).

In its brief, the Employer advances three issues as a basis to overturn the election results. The first (Objection 1) challenges the Region's failure to provide foreign language translation of the Board's notices of election. Second (Objection 2), is the conduct of a union observer accused, essentially, of electioneering from his observer's post during the election. Third (Objections 6, 8, 9), is the alleged conduct of union organizers during a visit to the home of an eligible voter.[5] Herein, I consider each issue in turn.

Objection 1. The Region's Failure to Provide Translated Notices of Election

Bally's objects to the failure of Region 4 to provide foreign language notices of election.

a. The Employer's request for foreign language notices and ballots and the Region's response

Board elections may involve ballots and/or notices of election prepared in languages other than or in addition to English.[6] Here, the issue was first mooted by Bally's on April 17, in response to an April 12 representation petition filed by the UAW over (essentially) the same bargaining unit at issue in this case. That petition was withdrawn and refiled with the petition assigned the instant case number on April 20.

[3] On June 14, Bally's moved to transfer these proceedings to another Region for adjudication. This motion was denied by the Regional Director on June 19. Bally's then filed a motion with the Board appealing the Regional Director's order. Bally's motion was denied by order issued July 12. On July 13, the Acting Regional Director ordered that the hearing in this matter be consolidated with an unfair labor practice case involving the same parties. Bally's subsequently moved to postpone and reschedule the hearing. The UAW opposed Bally's motion and moved to sever the election objections hearing from the unfair labor practice case. In orders issued August 1, Deputy Chief Administrative Law Judge C. Richard Miserendino granted the Union's motion to sever and denied Bally's motion to postpone and reschedule the objections hearing.

[4] The original objection indicated that the Petitioner "did not" object the request for foreign language notices. By letter dated June 12, Bally's informed the Region and the parties that the objection should read as set forth in the text.

[5] At the hearing the Employer presented evidence relating to several additional incidents. These incidents are not urged as objectionable, or even mentioned in Bally's posthearing brief. I therefore find that they are covered by Bally's withdrawn objections, or otherwise abandoned.

[6] The Board's official notice of election (form 707) is a one-piece document, 25-1/2 x 14", supplied by the Board's Regional Office and posted prior to Board representation elections in conspicuous places at the voting site. While the official notice of election is of a piece, it is comprised of three distinct parts or panels. The left one-third of the notice (as one faces the notice) sets forth recitations and explanations under the heading of "General" relating to topics such as the "Purpose of This Election," "Secret Ballot," "Eligibility Rules," "Special Assistance," "Challenge[s] of Voters," "Authorized Observers," and "Information Concerning Election." The middle one-third sets forth the specific unit covered by the upcoming election and the date, time, and place of the election, along with a sample ballot identifying the petitioner. This is the only portion of the form that is not generic. It contains information specific to the election for which the notice is being posted. The right one-third sets forth various rights of employees and responsibilities of the Board, and provides examples of objectionable conduct by unions or employers.

In his April 17 letter, Bally's vice president and associate general counsel, Gerald Einsohn, requested that the notice of election and ballots for the election in this case be printed in nine languages in addition to English. The languages requested were Chinese (Mandarin and Cantonese), Vietnamese, Hindi, Spanish, Bangladesh, Korean, Cambodian, and Laotian. The letter stated:

> I am writing you at this time, far in advance of the election, regarding our request to have the Notice of Election and Ballots printed in additional languages. We have numerous dealers whose first language is not English. They are hired to service our diverse clientele. The majority of the employees listed below, to our knowledge, do not speak English well and do not read English. They receive their instructions verbally in their native tongue from their supervisors or fellow employees and any written communication necessary to perform their job is verbally translated by a supervisor or fellow employee.

Set forth below is the languages and approximate number of employees:

Chinese (Mandarin and Cantonese)	180
Vietnamese	60
Hindi	80
Spanish	120
Bangladesh	15
Korean	8

> Cambodian and Laotian each of which are Approximately the same number as Koreans
>
> Based on the above, we are formally requesting that the Notices and Ballots be printed in each of the languages set forth above. It is our position that the failure to do so will amount to disenfranchising over 400 votes which is a third of the unit eligible to vote.

The Region responded the same day, April 17, in a letter from Field Examiner Mary Leach to Einsohn. Leach wrote:

> I am writing this letter requesting additional information and documentation relating to your request to the Region today for translated Notices of Election and ballots. Please respond to and provide the following:
>
> (1) When Chinese, Vietnamese, Hindi, Spanish, Bangladesh, Korean, Cambodian, and Laotian employees apply for work, are they given applications in their native language? If so, please provide copies of those job applications. When the above groups are interviewed, are they interviewed by employees who speak in their native tongue? Please provide the name of the employee who performs the interviews, and the language that the employee speaks.
>
> (2) When the above groups are hired, how does the Employer communicate with them concerning their fringe benefits? For example, if the Employer offers its employees health, dental, or life insurance, are those documents in the above-listed languages? If so, please provide examples of benefit materials in the above-listed languages.
>
> (3) When Chinese, Vietnamese, Hindi, Spanish, Bangladesh, Korean, Cambodian, and Laotian employees are hired, are they trained by employees who speak in their native tongue? Please provide the names of the employees who train them, and examples of the training materials that are provided to them.
>
> (4) When the Employer posts its Wage and Hour, EEOC, and OSHA-type notices to employees, are those notices posted in Chinese, Vietnamese, Hindi, Spanish, Bangladesh, Korean, Cambodian, and Laotian? If so, please provide copies of the notices.
>
> (5) Does the Employer translate any of its internal or other memos or notices to employees to Chinese, Vietnamese, Hindi, Spanish, Bangladesh, Korean, Cambodian, or Laotian? If so, please provide a copy.
>
> (6) Has the Employer provided any of the Chinese, Vietnamese, Hindi, Spanish, Bangladesh, Korean, Cambodian, or Laotian employees with translated campaign materials? If so, please provide a copy. Or, has the Employer hired any translators or interpreters who speak Chinese, Vietnamese, Hindi, Spanish, Bangladesh, Korean, Cambodian, or Laotian to communicate with employees about the Employer's campaign? If so, please provide the name and phone number of the translator or interpreter, and the agency from which they were obtained.
>
> (7) If any of the Chinese, Vietnamese, Hindi, Spanish, Bangladesh, Korean, Cambodian, or Laotian employees are issued written disciplinary warnings, does the Employer provide these warnings in Chinese, Vietnamese, Hindi, Spanish, Bangladesh, Korean, Cambodian, or Laotian? If so, please provide examples.
>
> (8) If the Chinese, Vietnamese, Hindi, Spanish, Bangladesh, Korean, Cambodian, or Laotian employees take licensing exams, are those exams administered in their native tongue? Are these licensing exams administered by the Employer or by the State?
>
> (9) If the Chinese, Vietnamese, Hindi, Spanish, Bangladesh, Korean, Cambodian, or Laotian employees are assigned duties where they interact with English-speaking patrons, how do they communicate with them?
>
> (10) Please submit any other evidence which supports your position that translated Notices of Election and ballots are needed.

Leach's letter asked Einsohn to respond by noon on April 19. On April 19, Bally's director of labor relations, Richard Tartaglio, wrote to the Region:

> I have been asked to respond to the April 17, 2007 correspondence to Gerald Einsohn, Esq. concerning the above referenced matter.
>
> Translators are used on an ad hoc basis to explain policies and procedures, applicable state and federal regulations, discipline, training and any and all other applicable employment related issues.

Subsequently, on April 23, Union Counsel William T. Josem wrote to the Region to record the Union's objection to Bally's translation request. The Union, citing the Board's Casehandling Manual, stressed its view that the Region's use of foreign

language materials was permissive, not mandatory, and asserted that the translation of the ballot and notices into nine languages would present problems of readability. The Union also took issue with the need for the translation, asserting that Bally's communicates with its employees in English, and indicating the Union's understanding that Bally's employee handbook and employee complaints were written only in English. The Union declared: "That employees may communicate with each other in a language other than English, as was pointed out in Mr. Einsohn's correspondence, is not relevant."

On April 20, the Union's representation petition was withdrawn, refiled that same day and assigned its current case number. The new petition triggered a new round of correspondence between Bally's and the Region. On April 23, Bally's reiterated its request for foreign language notices and ballots in a letter from Tartaglio to Field Examiner Leach that was essentially identical to the request sent by Einsohn on April 17. Tartaglio's letter restated Einsohn's request and added the explanation about Bally's ad hoc use of translators that he had set forth in his April 19 letter. Leach responded to the new request for foreign language notices and ballots with a letter tracking her April 17 letter, complete with a request that Bally's respond to the 10 questions set out in the previous letter. This time, she stated:

> This is in response to your April 23, 2007 request that the Notices of Election and ballots in the above-captioned case be translated into nine languages other than English. In your letter you state, in part, that "Translators are used on an ad hoc basis to explain policies and procedures, applicable state and federal regulations, discipline, training, and any and all other applicable employment related issues." A review of your request indicates that it does not contain sufficient evidence to establish that the Notices of Election and ballots require translation into languages other than English in order to permit non-English speaking voters to exercise their rights in the election in this case.
>
> Therefore, I am requesting your response to the attached questions. Please answer each question and provide supporting documentation by Monday, April 30, as well as any other information that will demonstrate to the Region the need for Notices of Election and ballots to be translated into nine languages. Please note that I understand that you are very busy, and I do not wish to be overly burdensome with my requests. However, in order for the Region to adequately consider your request, specific detailed information must be provided. If the requested information is not provided, it is possible that your request will be denied.

Attached to the letter were the same 10 questions (listed above) that Leach had sought from Bally's counsel, Einsohn, in her April 17 letter.

Tartaglio responded to Leach's request by letter dated April 27. He stated:

> In reiteration of my correspondence of April 23, 2007, it continues to be Bally's position that a substantial portion of our Dealer population do not fully read or understand English. It is not relevant how communication is handled on a day to day basis. What is relevant is that in order to avoid disenfranchising a substantial portion of Bally's non-English speaking Dealer population, the ballots must be in a language which will permit each of them to properly exercise their right to vote in the election in this case.

By letter dated May 3, Region 4 Regional Director Dorothy L. Duncan-Moore wrote to Tartaglio informing him that "I have concluded that your request for foreign language translations must be denied." Regional Director Duncan-Moore noted that a Stipulated Election Agreement providing for a June 2 and 3 election among the approximately 1200 employees in the stipulated unit had been agreed to by the parties and approved by the Regional Director. She referenced that "the Board Agent advised you by letter dated April 25 that the information set forth in your April 23 letter was insufficient to establish that translations were required," and noted that the Board agent had requested answers to questions "concerning the need for the requested translations and the manner in which the Employer regularly communicates with non-English speaking employees both orally and in writing, including the documents issued to employees by the Employer." In concluding that the translations would not be provided, the Regional Director concluded:

> I have carefully reviewed your letters of April 23 and April 27 and concluded that you have not submitted sufficient evidence to establish that translations of either the Notice of Election or the ballots are necessary in this case. In your letter of April 23, you asserted that English is not the first language of more than 470 dealers, the majority of whom do not read English, and that supervisors and fellow employees are used "on an *ad hoc* basis" to translate instructions and some written communications. In your letter of April 27 you again asserted that a substantial number of the unit employees "do not fully read or understand English." However, you failed to answer any of the Board Agent's questions and asserted that:
>
> It is not relevant how communication is handled on a day to day basis. What is relevant is that in order to avoid disenfranchising a substantial portion [of the unit], the ballots must be in a language which will permit each of them to properly exercise their right to vote in the election in this case.
>
> In these circumstances, I find that you have failed to demonstrate that there exists a need for either the Notice of Election or the ballots to be translated as you request. Although a substantial portion of the bargaining unit employees apparently speak English only as a second language, you have cited no NLRB or court precedent requiring that election materials be translated based only on the foreign birth of some of the voters. Although the Employer uses supervisors and employees to verbally translate some oral and written materials for some of the voters, you admit that such translation is done only on an *ad hoc* basis. Despite our specific request, you also offered nothing to suggest that the Employer routinely issues written communications of any sort in any of these foreign languages. In addition, you have submitted no specific evidence to show that voters would in fact be unable to un-

derstand the Notice of Election or the ballot [footnote omitted], though such evidence could have established such a need. Accordingly, I am denying your request to translate the Notice of Election and ballots in this case. See Casehandling Manual Section 11315.1.

The election went forward on June 2 and 3, with English notices of election posted prior to the election, and English ballots used in the election. Over 90 percent of eligible voters cast ballots. More than 70 percent of the counted ballots were cast in favor of union representation.

b. Language issues and the Employer's operation

At the hearing, the parties developed evidence regarding the use of foreign languages at the Employer's facility.

As background, the facility at issue is a large Atlantic City Casino opened more than 27 years ago and since 2005 owned by Harrah's. There are approximately 5000 employees, including approximately 1200 bargaining unit dealers (including "dual rate" employees who voted under challenge and whom the Employer takes the position are statutory supervisors). The bargaining unit dealers operate a number of different games including blackjack, poker, craps, and roulette. One area of the casino is called the "Asian Pit" and it is devoted to games that are frequented (although not exclusively) by customers from Asian countries or backgrounds. These games include a "tile game" (like dominoes but without the dots), paicow poker, seven card poker, and mini-Baccarat. Dealers of Asian descent are employed primarily, but not exclusively in the Asian Pit. Generally, dealers with thick accents are not encouraged to work games such as craps that involve relatively more conversation and interaction with customers, than some of the other table games, such as blackjack, in which the nature of the game and the use of hand signals limit the necessity of extended conversation.

The evidence shows that a very significant (though unknown) number of dealers were born in other countries. A significant number speak English as a second language. In recent years in particular, the ethnic and national origin background of the dealers has become very diverse. As Michael May, Bally's vice president in charge of table games, who oversees dealer hiring, explained, "from a cultural standpoint and ethnicity, it really is across the board."

The testimony establishes convincingly, and not surprisingly, that on breaks, during meals, and in social situations, employees who speak English as a second language prefer to speak their native language with one another.

On the floor of the casino, English is the standard language spoken by dealers. This emanates, in part, from a rule, developed 20 years ago and still formally in effect, that forbids dealers from speaking to customers in any language other than English. As May, explained, the rule emanated from a concern about the potential for collusion between a dealer and a customer. With an English-only rule, the supervisors watching the game are able to understand any conversations. Formally, the rule remains in place. As May described it, "You're supposed to speak—if you speak to a customer casually you're supposed to speak English." However, May also offered that the rule "has gone by the wayside" and "it is not something that is really enforced across the board. If anything, in order to provide better customer service we've gone the other path to allow dealers to speak in their native tongue to those customers that are in the game." Such foreign language conversations happen regularly and May suggested that they are encouraged as part of Harrah's emphasis on customer service. However, the relaxation of the rule described by May has not been clearly communicated to lower-level supervision. At the hearing, three Bally's supervisors offered language-related testimony and they provided mixed testimony on whether non-English conversations with customers were permitted. Chong Wong and Douglas Vargas-Brenes were certain that dealers must speak English with customers (see, e.g., Tr. 35, 46, 47, 52, 86), even in the "Asian Pit" (according to Wong). Another, Wendy Chen, in agreement with May, suggested that it was acceptable for a dealer to speak a foreign language with a customer who indicated or demonstrated a preference for that language and that this occurred frequently in the Asian Pit (see, e.g., Tr. 170, 178–179). Vargas-Brenes (fluent in Spanish and English and a native of Costa Rica) preferred talking Spanish to native Spanish-speaking dealers. In the event of a dispute between a Spanish-speaking dealer and a customer he would intervene and ask the customer if it was ok for him to speak Spanish to the dealer, a request to which customers routinely agreed.

Bally's witnesses testified to assisting with translation of memos or directions on occasion with dealers who did not readily understand English instructions. The frequency of this varied. Wong testified that he would speak Vietnamese or Chinese with a dealer if they did not understand something but asked how often this occurred, said "[n]ot much."[7] Generally at work he speaks English to the Vietnamese or Chinese employees.[8] However, there are "occasions" when he translates for employees and he testified that of the "Asian dealer[s]" "some [have] very poor English." Vargas-Brenes also described performing ad hoc translations for dealers, as necessary, and indicated a

[7] In response to questioning by the Employer's counsel, Wong testified that he "interpreted" for Chinese or Vietnamese employees "like maybe 10 time per year," but when the Employer's counsel followed up by clarifying that by "employees" he meant to limit the question to employees who were "dealers" Wong changed his answer and said it was "two or three time per week." These answers are inconsistent. As noted, above, Wong originally indicated that it was "not much" that he spoke Vietnamese or Chinese with a dealer who did not understand something. I believe that 10 times per year was the more accurate answer and the subsequent answer an effort to accommodate the Employer at the hearing.

[8] I note that references at the hearing by witnesses, and by me in this decision to, "Chinese," "Vietnamese," "Spanish," or other dealers is a general reference to the assumed ethnicity or national origin of dealer. As would be expected, witnesses did not know if a particular dealer who spoke, for instance, Chinese, was actually from China, Vietnam, or Jersey City. The witnesses did not know (for the most part) whether a particular "Chinese dealer" (to use that example again) was an American citizen, a longtime resident of the United States, or a recent immigrant. The reference is used to denote the presumptive background of such dealers but more accurately denotes their observed ability to communicate in a relevant non-English language and, I am sure, the appearance of the individual.

preference for speaking Spanish to Spanish-speaking dealers. Chen described talking Vietnamese or Chinese to dealers who spoke it, and acting as an interpreter "all the time," but said she communicated in English with Hindi, Spanish, and English native speaking dealers.

Applications for employment are in English only. Dealers are hired through an application process that includes an audition, "which means they come to table games department and we actually put them on a live game to see if they can handle dealing in front of customers." Applicants who pass the audition "come downstairs and are spoken to with a representative of the table games department. Normally it's shift manager who will ask them some simple questions, and a decision is then made, with regards to them being hired." Asked, "[A]re interpreters ever used in talking with applicants who have passed the audition?" May answered that "I have never used an interpreter."

Bally's utilizes an extensive employee handbook, which is provided to each employee, and is written only in English. Its first page is titled "Acknowledgement[,] Receipt of Employee Handbook" and provides for the employee to sign a page that includes the acknowledgment that

> I understand I am responsible for compliance with these regulations, policies and procedures. I understand it is my responsibility to read the Handbook carefully and ask questions of my supervisor or the Human Resources Department if there is information I do not understand.

Similarly, Bally's distributes benefits handbooks, employee evaluation, and employee complaint forms that are in English. Muscalino thought that there were some benefits books in languages other than English but he did not provide examples. Safety training is generally in English only, but some OSHA training is done in Spanish. Written discipline is given in English only and employees are required to sign an acknowledgement that they have received the discipline.

Bally's labor relations manager, Patricia Fineran, is involved in the nonunion grievance procedure established by Bally's for employees. She has had occasion to need to use a Spanish translator for one of the dealer grievance hearings but doesn't have a recent recollection of using other language translators. Generally, she was unable to recollect many such recent situations with dealers, and stated that she had not had many "lately, over the last several months prior to the election, I haven't really dealt with too many dealers."

In the last couple of years Bally's has begun offering English as a second language class for interested employees. No evidence was presented as to the number of employees attending the classes, or what portion were dealers.

Frank Muscolina, Bally's vice president of human resources, testified that Bally's held numerous mandatory meetings for employees in conjunction with the union election and campaign. Each dealer was to attend roughly five meetings, each of which Muscolina estimated lasted 1 to 1 hour and 15 minutes. Muscolina described the purpose of the meetings as being "to inform people as to pros and cons" of union representation. The meetings included a description of the election process and information on how the election would be conducted. The Employer used a sample ballot at the meeting to go over with employees the "Yes" and "No" notations to be marked on the ballot by voters. At these meetings Bally's provided translation services for employees in a number of languages. When employees signed in for the meeting they could get translation equipment consisting of a transistor and headphone. The transistor was the size of an ipod and the employee could set the transistor to play one of several languages. Muscolina testified that Bally's decided to provide the translation services because in a prior election at another facility they had not done so and, according to Muscolina, employees there had felt they were at a disadvantage and could not understand everything discussed in the meeting. At the meetings that Muscolina attended (approximately 12–13), Bally's handed out all the translation sets, which was between 75–82 sets. There were between 100–150 employees at the meetings Muscolina attended and not enough translation sets for those approaching the tables where the sets were kept. No records were kept of how many people used the translation equipment. Muscolina estimated that Bally's spent between $250,000 and $300,000 on translation services for the campaign.

In addition, some of the Employer's (and some of the Union's) campaign literature was translated into various languages, including Spanish, Hindi, Cantonese, Mandarin, and Vietnamese. This included a Spanish language Board-created "Notice to Employees" indicating that a petition seeking an election had been filed and reciting various rights of employees and examples of unlawful conduct under the Act. This document was distributed in English and in Spanish by Bally's. Literature was both mailed to dealers' homes and distributed by hand. Bally's also placed campaign ads with the local media (such as TV, radio, and newspapers) but these were only in English.

Harrah's encourages its employees (which since 2005 include Bally's employees) to complete opinion surveys to ascertain the employees' views on the Company and their views on supervisors. The surveys are available in 15 languages. They are used throughout Harrah's owned properties which employees 95,000 people around the country at 48 properties. No evidence was offered regarding the extent to which the surveys were completed, or the language in which they were completed, by Bally's employees generally, or by dealers specifically.

c. Analysis

The Employer contends, essentially, that foreign translations of Board notices of elections must be provided on request. It also contends that the Region's failure to do so in this case warrants the overturning of the election. I reject the Employer's contentions for the following reasons.

I. THE BOARD'S POLICY ON TRANSLATION OF NOTICES

While a request for foreign language notices in Board elections is often accommodated, the Employer's contention that foreign language translations *must* be provided upon the request of a party rests upon no Board or court precedent, and no Board rule or regulation.

Bally's cites *Marriott In-Flite Services Division v. NLRB*, 417 F.2d 563 (5th Cir. 1969), cert. denied 397 U.S. 920 (1970),

and *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160 (7th Cir. 1990), cert. denied 499 U.S. 959 (1991), but neither compel a result in the Employer's favor.[9] Indeed, the salient holding is that of *Precise Castings*, 915 F.2d at 1164, which approved the Board's policy of allowing regional directors discretion to decide on the use of translated ballots and notices:

> Precise Castings observes that the Board has not established a national policy but has left to its regional directors the choice among multi-lingual ballots in different languages, and English ballots plus election notices in other languages. . . . Nothing in the National Labor Relations Act prevents the Board from giving its subordinates discretion in matters of this kind.

This (and not the Employer's proposition that translations of notices of elections must be provided on request) is the Board's policy. The Regional Directors' discretion is circumscribed by the need to ensure that the use of only English election materials does not result in interference with the employees' free choice. *Northwestern Products,* 226 NLRB 653 (1976) ("The Board's decision [on the objection to the use of English only notices and ballots] must be based on a showing that there was interference with the election, resulting from the use of notices and ballots printed only in English."). This policy of leaving the matter to the discretion of the Regional Directors is consistent with the Board Casehandling Manual, which, as the Employer points out, is not binding authority,[10] but adherence to which is desirable as it is "intended to safeguard a free and fair election." *Kirsch Drapery Hardware*, 299 NLRB 363, 364 (1990).

The Casehandling Manual contains significant guidance for agency staff on the utilization of foreign language materials in Board elections. Section 11315.1 of the manual clearly makes use of foreign language notices, and other materials, a matter of discretion based on a showing of need:

> As detailed in Sec. 11315.2, notices of election, including side panels and/or center panels and/or ballots in languages other than English, may be provided in addition to English notices, where the need is shown in appropriate circumstances. . . .
>
> Because the preparation of foreign language notices may be extremely costly and may delay the election, the Regional Director should carefully evaluate requests for such notices. In deciding whether to provide translated notices and/or ballots, the Regional Director may consider the following factors:
>
> (a) the portion of the voting group which speaks a foreign language and does not read English
>
> (b) the number of foreign language translations that would be required to accommodate these voters
>
> (c) whether written communication between the employer and these employees is in English or their native language. (The mere fact that employees may communicate among themselves in a language other than English is insufficient to demonstrate that they do not understand written English.).

In this case, the Regional Director's request for information substantiating the Employer's request for foreign language notice and ballot translations was clearly suggested by and in accordance with the casehandling manual. Indeed, consistent with the casehandling manual, as recently as 2001, in a memo submitted into evidence at the hearing in this case, the Regional Director had instructed Region 4 employees that

> Because translation costs can be substantial, it is important that, before agreeing to provide any translations, we find out from the parties enough information to enable us to evaluate whether there is a real need to have either the Notice of Election or the ballots translated into a foreign language. Accordingly, when you have such a case, please ascertain from the parties (1) the number of foreign languages and /or dialects involved, (2) what portion of the voting group reads only a foreign language and (3) how the Employer (and/or the Union during its campaign) communicates written information to the voters who do not read English. The determination of what materials, if any, should be translated, will depend on the answers to these questions.

The Region's inquiry into these matters is consistent with the policy of allowing the regions discretion to determine whether translations are necessary. The Employer's suggestion that the Region's inquiry is illegitimate is not only without support in precedent, it is farfetched. The provision of foreign language notices—particularly of nine foreign language notices as requested in this case—is far from a ministerial act. To adopt the position urged by the Employer would open the door to significant cost and delay without permitting a region any opportunity to test the substantiveness of a party's request for foreign language translation. It would be unwise for the Board to follow a rule that requires translation upon request without permitting the region to investigate the appropriateness and need for the

[9] *Marriot Corp.* has never been followed by the Board, but in addition, is inapposite. It is based on a finding by the court that in 1969 the Board had a policy requiring foreign language ballots whenever foreign language notices were used, while the Region involved in the *Marriott* case had a policy against foreign language balloting in every case. Putting aside the not minor fact that the Employer here does not object to the Region's failure to use foreign language ballots, another difference is that, whatever the case in 1969, today there is no policy requiring use of foreign language ballots (or notices) by the Board as a whole and no policy forbidding their use by the Region involved in the matter here. See *Precise Castings*, supra at 1161 (since *Marriott* the Board has made it clear that it has no policy requiring the use of ballots in multiple languages); *Superior Truss & Panel, Inc.*, 334 NLRB 916, 919 (2001) (The Board has made it clear that it has no policy requiring the use of ballots in multiple languages.).

Precise Castings, supra, was a case in which the Seventh Circuit Court of Appeals affirmed the Board's refusal to provide translated ballots for an election where "[t]en of 41 employees eligible to vote read and speak Spanish only." Bally's contends that the court reached that result only because in that case the notices of election had been translated. That was a factor in the court's reasoning, and the court did assume that notices would be translated upon request of either party, but, fairly read, the case does not suggest that in the absence of translated notices the election would have been invalidated. In any event, even assuming, wrongly, that the case held that, it involved, as noted, a situation where nearly 25 percent of eligible voters did not speak or read English, something completely undemonstrated here.

[10] *Superior Industries*, 289 NLRB 834 fn. 13 (1988) (contrary to the Respondent, the Casehandling Manual contains guidance, not rules).

translation. In determining whether to provide the foreign language materials, the region must be guided by the necessity of ensuring that the election is carried out in manner that does not hinder (or have a reasonable tendency to hinder) the exercise of employee free choice. In particular, an assessment of the use of English in the workplace is significant to this determination. Bally's disputes the relevance of this inquiry, but its position is at odds with Board precedent.[11]

II. THE EMPLOYER'S NATIONWIDE REVIEW OF NOTICE OF ELECTIONS USED IN OTHER CASES

The conclusion that there is no rule requiring the translation of notices upon request is not undercut by the argument most vigorously advanced by Bally's: that is, its claim that documents obtained in unrelated cases, produced to Bally's by Board Regional Offices (from across the country including Region 4), pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, "reveal a consistent nationwide policy to grant a request for foreign language Notice of Election—excluding the casinos operating in Atlantic City." (Emp. Br. at 16.)

In preparation for the hearing in this matter Bally's submitted extensive FOIA requests to Board headquarters and Regional Offices around the country. Its initial request sought copies of all notices of election printed in languages other than English for representation elections, for the period January 1, 2006, to June 1, 2007. In response the regions (there are 32 Regions, some with offices in more than one city) provided hundreds of foreign language notices, overwhelmingly but by no means exclusively in Spanish.[12]

Bally's followed its request with another seeking correspondence from the Regional Offices during this same period in which the Region had rejected a request to provide a notice of election in a language other than English.[13] This yielded the production of one instance of correspondence between a regional office and a union attorney in which a request for Spanish language ballots was denied because of a failure of the attorney to provide evidence of the need for such ballots. (Emp. Exh. 9 at 2404–2406.) It also included Region 4's March 14 rejection of a request by another casino for translation of notices of election and ballots into Chinese 5 working days before the scheduled election. (Emp. Exh. 9 at 2354–2356). In that case, the Regional Director concluded that the request was untimely, and, in addition, found that the Employer had "failed to demonstrate that there exists a need for Chinese translations," basing her conclusion on the employer's communication with employees only in English and reliance on bilingual employees for assistance as needed on an informal basis. The Employer's special appeal to the Board of this decision was denied "for essentially the same reasons noted by the Regional Director." (Emp. Exh. 9 at 2356.) Finally, at the hearing in this case, the Regional Director's representative introduced into evidence an April 30 letter from another representation case, in which the Regional Director denied a request that notice of elections be translated into Mandarin Chinese and Vietnamese or, alternatively, that translators attend the election. (B. Exh. 4.) Similar to her conclusion in the instant case, in that case the Regional Director found that the employer had failed to demonstrate a need for translations, by showing only that the employer used foreign language interpreters during its campaign and that for 35–45 percent of the unit English was a second

[11] See, e.g., *Northwestern*, 226 NLRB 653, 654 (1976) (Here we note that all of the Intervenor's previous collective-bargaining agreements with the employer have been printed only in English. As contracts with, notices to, the employees by both the Employer and the Intervenor have been in English only. The intervenor's dues-checkoff authorizations have been printed in English only. These facts tend to show that the use of notices and ballots in English only could not have had an adverse impact on the election, and hence the record does not establish any basis for setting the election aside); *King's River Pine*, 227 NLRB 299 fn. 2 (1976) ("As to the Employer's objection that the Regional Director failed to furnish bilingual notices and ballots for the election, we find that the Employer has failed to present evidence that a substantial number of Spanish surnamed employees could not read or understand English, and therefore, the absence of bilingual ballots did not constitute sufficient grounds for setting aside the election.").

Bally's contended to the Region that "[i]t is not relevant how communication is handled on a day to day basis." Bally's bases it position on a misreading of *Kraft, Inc.*, 273 NLRB 1484 (1985), where a Board majority overturned an election due to erroneous translations and a layout so flawed it "makes for difficult reading even for the English-reading voters." In *Kraft*, the Board found that "the multilanguage ballot furnished by the Region is so seriously defective on its face as to interfere with the employees' ability to exercise their election choice" and rejected the regional director's conclusion that use of English in campaign literature, a succession of labor agreements, and the dues-checkoff cards, "somehow justified the poorly translated Board ballot." In this context, the Board stated,

> [w]e attach no weight to the fact that non-English reading employees may be forced to deal with only English translations in the workplace. Rather, it is the Board's responsibility when a multilanguage ballot is deemed appropriate to supply a ballot that can be comprehended in all the languages appearing on the ballot.

Bally's quotes the above language and suggests that it shows that use of English is irrelevant to whether the region should have provided translated notices or ballots. This is a misleading and out-of-context reading of *Kraft*. The Board's conclusion in *Kraft* was that when a multilanguage ballot is deemed appropriate because of the acknowledged presence of non-English reading employees, it is the Board's responsibility to create and use an intelligible ballot, with legible layout and translations. With an illegible or confusing document, it is no defense to an objection to maintain that English is so heavily relied upon that the garbled nature of the ballot is irrelevant.

[12] According to information and computer data provided by the Office of the General Counsel at NLRB headquarters there were over 600 such cases during the period at issue. (Emp. Exh. 9 at 98–139), although 107 were petitions filed prior to that period. The list appears to include cases in which election activities occurred after January 1, 2006. The number submitted by each region varied dramatically. Of course, so does the number of elections in each region during the period and, certainly, the incidence of non-English speaking work forces within the geographic area administered by a Regional Office. According to these records, two of these cases involved the translation of notices into six languages. None involved translation into more. The overwhelmingly majority involved translation of one, and sometimes two languages. Region 4 submitted notices for eight cases for this period, none translated into more than one language.

[13] This request was followed by one to each Region seeking the same information but appending a list of case names and numbers, received from the Board's headquarters that had originated in the Region during the requested period. This enabled the Regions to search for the requested information with reference to specific cases.

language. In that case, the employer, according to the Regional Director, had refused the region's request that it provide evidence of how the employer communicates with employees in its operation of the facility.[14]

The remainder of responses from regional offices (including from Region 4) indicated that there was no further correspondence during this period responsive to the request. A few added that no requests had been rejected during this period, others stated that no records are kept of such requests but the region had no recollection of rejecting any such requests.[15]

At the hearing, I expressed skepticism about the relevance of these documents, and about the Employer's view that they showed either arbitrariness or discrimination by the Region against it (or the casino industry). But given the Employer's view of the centrality of the documents to its arguments, I accepted these documents (over the Union's objection) into the record to permit consideration of the issues raised by the Employer after briefing.

Having further considered the matter, I conclude that the documents do not advance the Employer's objection. They do not prove, as Bally's claims that the Region acted arbitrarily or discriminatorily in denying the request for translations in this case. They show, for sure, that translated notices of elections are used by regions throughout the country.[16] And the lack of correspondence rejecting requests for foreign notices does suggest that the requests are granted (and perhaps, even rejected) without much ado. But these documents tell us nothing about the reasonableness of the request, or the Region's response, in *this* case.

It is not just that none of the elections referenced in Employer Exhibit 9 appear to have resulted, or been the product of a request for the translation of nine (or eight, or seven) foreign languages, as was requested here. Two cases involved six languages, but we have no idea what factors were relied upon for that extensive a translation to be deemed warranted. But even beyond that obvious distinction, we know nothing about the circumstances in each case. We do not know if there was an objection to the translation as was interposed by the Union here. We do not know if there were oral discussions between the parties reaching an agreement with the Region on whether and to what extent translations were warranted. We do not know whether in the cases where translations were undertaken, the lack of English in the bargaining unit was manifest and known to all parties. We simply do not know anything about the election cases in other Regions (or the other cases from Region 4) that prompted the translation request. This is, as a practical matter, not subject to ascertainment. Each case may have different factors and those cases were not litigated, so reliance on these documents means reliance on matters that were never sharpened, challenged, or defended in litigation. Perhaps, it is Bally's request, under the circumstances here, that is extraordinary, and not the Region's response. The documents from other cases tell us nothing about this case.

The appropriateness of the Region's determination in this case is measured by whether that determination is consistent with Board policy on the translation of notices. That policy is found in Board precedents, not in a review of the unlitigated and uncontested decisions of individual Regions in response to requests for translation in cases around the country. In order to succeed with its objection to the failure of the Region to translate the notices of election, the Employer must show that this failure resulted—*in this case*—in undermining the election process. That is the standard or "rule" that the Board requires the region to satisfy in conducting an election. Whether, in other cases, the regions have provided translated notices of election is irrelevant. See *Superior Truss & Panel, Inc.*, 334 NLRB 916, 919 (2001) (in view of Regions' discretion, "[t]herefore, the Employer's argument addressing other Regions use of foreign language ballots is simply irrelevant").

III. THE UNION'S CONTENTION THAT THE EMPLOYER'S OBJECTION SHOULD NOT BE CONSIDERED

As discussed, in response to the Employer's request for translation of the notices and ballots into nine foreign languages, the Region sent Bally's a list of ten detailed questions in an attempt to assess the need for the translation. One could contend that fully answering all 10 questions would be unduly burdensome but Bally's did not. Instead, it simply asserted in response to the Region's inquiry that,

> In reiteration of my correspondence of April 23, 2007, it continues to be Bally's position that a substantial portion of our Dealer population do not fully read or understand English. It is not relevant how communication is handled on a day to day basis. What is relevant is that in order to avoid disenfranchising a substantial portion of Bally's non-English speaking Dealer population, the ballots must be in a language which will permit each of them to prop-

[14] Bally's objected at trial, and objects in its brief to the introduction of this document, which was not supplied to it in response to its FOIA request. Bally's contends that the document should be stricken as a penalty for not producing it pursuant to the FOIA request. The Region took the position at trial that the document fell within a FOIA exemption privileging its nonproduction. I admitted the document at trial because it is relevant—at least, it is as relevant as the Employer's evidence in Exh. 9 as a whole—and because it fell within the time period for which the Employer had already introduced hundreds of similar documents in an effort to offer a complete picture of the issues raised by the Employer. Given the Employer's contentions, the record was better served by including all pertinent documents for this time period. Whether the Region or the Employer is right with regard to FOIA obligations, I leave to the parties to pursue, should they choose, under FOIA's enforcement mechanisms. See 5 U.S.C. 552 (a)(4)(B). In any event, I do not think inclusion or exclusion of this document is critical to any party, or to the resolution of this case.

[15] I grant the Employer's amended motion to admit supplement to Emp. Exh. 9 (to which no opposition was filed) seeking to introduce further responses, received posthearing to this second round of requests. As marked on the bottom right corner of the submitted documents these pages are admitted into the record as pp. 2462–2465 of Emp. Exh. 9.

[16] A database of active representation cases provided by Board headquarters to the Employer (Emp. Exh. 9 at 2196–2200) showed 4800 such cases. Nearly 300 of those were filed prior to January 1, 2006, but were active cases, often with an election scheduled, between January 1, 2006, and June 1, 2007. Thus, based on the data supplied by the Board headquarters, approximately 11–13 percent of representation cases during this period involved foreign language notices.

> erly exercise their right to vote in the election in this case.[17]

The lack of cooperation with the Region's inquiry is manifest. It is consistent with the position taken postelection that Bally's is entitled upon request, with nothing more, to receive foreign language translations of notices for use in the election, a position that, as I have discussed, is without support in logic or precedent. Indeed, it is notable that the Region's denial of Bally's request on May 3, explicitly cited Bally's failure to provide sufficient evidence to demonstrate that translations were necessary or any evidence to show that voters would be unable to understand the notices or ballots. Although this explanation was sent to the Employer a full month before the election, Bally's took no steps to provide the requested information, preferring, apparently, to reserve any evidence for postelection objections.

The Union contends (U. Br. at 9–10) that Bally's refusal to cooperate with the Region's inquiries should bar it from introducing evidence postelection that "should—and could—have been presented when the Region originally made its requests for information." As the Union puts it, "[a]ny other result would reward a party for refusing to provide requested information to the Region in such circumstances."[18]

This argument is not without force. As every practitioner (on every side of the labor-management divide: union, employer, and Government) knows, cooperation is the lifeblood of the administrative law system. Penalties for noncooperation abound. Charges are dismissed, complaints are withdrawn, and summary findings are made based on a lack of cooperation by a party. Issues are waived before the Board if not brought to the attention of the administrative law judge. Issues not raised before the Board may not be raised in court challenges. The reasons are obvious and profound. At each stage of the administrative process the Agency must be permitted to resolve issues that could stand in the way of efficient, timely, and just administration of the Agency's mission. Permitting the litigation of issues that could have and should have been considered earlier in the administrative process comes at great cost in terms of expenditure of resources, time, delay, and justice. This situation is illustrative. The Region requested the Employer to provide support for its claims that translated election materials were necessary. Had the Employer cooperated, it may have convinced the Region to accede to its request, and the election would have gone forward in the manner urged by Bally's. By not cooperating, Bally's is complicit in creating circumstances that it now claims warrants a new election. And of course, perhaps perversely, the stronger Bally's case at the hearing that the absence of translations undermined the employees' free choice, the more it should be deemed responsible for the elections' failings. To overturn the election on these grounds now would, in fact, reward Bally's for its noncooperation, to the detriment of the Board's election process. I am sympathetic to the argument that Bally's should not be permitted to overturn this election, forcing over 1100 employees back to the polls, because of arguments and evidence it could have presented in response to the Region's questions on this very subject.

There would be, however, costs to a rule that prohibits Bally's from litigating an objection on an issue as to which it was requested but refused to provide information preelection. If Bally's concerns about the notice of election are warranted, then it is the employees' free choice that has suffered because of Bally's noncooperation. The non-English speaking and reading employees are left to the willingness and competence of the union and employer to request and then support the request for translated election materials. However, it is also true that this is the case in nearly every representation case and most unfair labor practice cases. The union and employer parties make decisions that impact the rights of employees in all aspects of the representation process. That reliance on the employer and union to identify and shape some issues, and ignore others, is a normal part of the process.

Were I writing on a blank slate, I might be inclined to reject Bally's effort to litigate this issue. However, I think that the Board's decision in *Northwestern Products,* 226 NLRB 653 (1976), precludes the approach urged by the Union.

In *Northwestern Products*, an incumbent union intervenor raised postelection objections to the use of English only ballots and notices. Prior to the election the parties (including the employer, the union petitioner, and the intervenor union) had stipulated that the notices and ballots would be in English only. In an argument similar to that advanced by the Union here, the Board explained that "[t]he Petitioner contends that the Intervenor's objections must be overruled on the ground that the parties had agreed to conduct the election solely in English and stipulated that they would not challenge the election because of this fact." Indeed, in *Northwestern Products*, the intervenor had been asked whether it was requesting bilingual ballots and notices and had indicated it was not. The Petitioner further objected on grounds that the language difficulties of employees failed to establish that they did not understand the ballot. In *Northwestern Products*, the Regional Director had granted the objection and overturned the election because of the language problems in the bargaining unit. The Board rejected the Regional Director's recommendation, but in doing so stated that

> we do not place total reliance on the stipulation of the parties. Any such stipulation, even one for bilingual ballots, is a factor, but nevertheless, is not controlling. The Board's decision must be based on a showing that there was interference with the election, resulting from the use of notices and ballots printed only in English. . . . Although, as indicated above, a stipulation such as involved here may not be the decisive factor in determining whether there has been interference with an election, it is entitled to consideration and some weight.

[17] I note but will otherwise ignore for purposes of the analysis that the above response to the Region says nothing about notices of elections, but insists only that translated ballots must be provided. However, I will consider this an inadvertent error. I believe the Region understood that Bally's maintained its original request that ballots and notices of election be translated.

[18] At the hearing, the Union raised and preserved this objection to the introduction of any evidence by the Employer offered on language-related issues among the work force. I decided to take the Employer's evidence without prejudice to the Union's argument (in effect, conditionally overruling the Union's objection) but invited the Union to raise this issue in its brief.

The implications of the Board's view for this case are inescapable. If a preelection stipulation to use English-only notices and ballots does not bar a postelection objection to the use of English only notices and ballots, Bally's failure to cooperate in establishing the need for them cannot bar its posthearing objection over the failure to grant its request. Therefore, although I am sympathetic to the union argument, I think that *Northwestern Products* represents the Board's precedent on this question. I therefore reject the Union's position that Bally's objection and evidence in support of it should not be considered.

IV. THE EMPLOYER HAS FAILED TO DEMONSTRATE THAT THE FAILURE OF THE REGION TO TRANSLATE THE NOTICES HAD A TENDENCY TO INTERFERE WITH EMPLOYEES' FREEDOM OF CHOICE

Provided the opportunity at the postelection hearing, the Employer has failed to show that the Region's refusal to translate the notices of election resulted in interference with the employees' free choice. That is the nub of the issue presented by this objection. *Northwestern*, supra ("the use of notices and ballots in English only could not have had an adverse impact on the election, and hence the record does not establish any basis for setting the election aside"); *Superior Truss & Panel Inc.*, 334 NLRB 916 (2001) (refusing to overturn election in unit where 10–15 of 28 eligible voters did not understand, speak, or read English, despite claims that English only ballot and deficient translation of notices warranted rerun, where there was no showing of confusion among voters regarding election).

At the hearing, Bally's convincingly demonstrated that many of the dealers speak English as a second language, and that when given an opportunity, they prefer to speak their native tongue to one another. Supervisors who share a native tongue with someone they supervise share in this preference and practice. As, Douglas Vargas-Brenes explained, "[i]t comes natural" and leads to "[b]etter understanding." None of this demonstrates that dealers are unable to understand written English or are unable to understand voting instructions in English. That is a threshold issue for Bally's case and it is unproven on this record.[19]

As to evidence in support of that proposition, the evidence is very limited. In the first place, as an employer, Bally's overwhelmingly operates in English and English only. Its handbook, which is an extensive compendium of rules and regulations governing all aspects of employment, includes an acknowledgement which each employee must sign indicating that "I am responsible for compliance with these regulations, policies, and procedures. I understand it is my responsibility to read the handbook carefully and ask questions of my supervisor or the human resources department if there is information I do not understand." It is fair to assume that Bally's considers this acknowledgement as grounds for holding employees responsible for compliance with the rules in it. Clearly, Bally's intends for dealers to read the handbook and expects that they can.

As discussed above, Bally's operates in English. Its applications for employment are taken in English and there is no evidence that translation is used in hiring or the interview process, although the hiring of foreign born dealers is quite common. Written employee discipline is meted out in English only. While the strict "English-only" rule of years past barring the speaking of any language but English with customers has been relaxed, this demonstrates only a willingness to allow dealers to speak a foreign language with like-skilled customers. It does not demonstrate the inability of dealers to communicate in English. The assertions in its initial request to the Region that hundreds of the dealers cannot read or understand English is entirely unproven on this record.

Bally's relies upon the showing that translation is used in the facility on an "ad hoc" basis. However, I agree with the Regional Director (who entertained this argument preelection) that this is insufficient to demonstrate the need for foreign language notices to enable employees to participate meaningfully in the election. The ability of Bally's to operate in English, with reliance only on "ad hoc" translation if and when available, suggests that the language problem is extremely limited in scope and severity. It shows that there are employees who prefer to have some information translated. But, since it is ad hoc, these same dealers must also be able to perform their work, maintain their jobs, and go about their business without translation. Obviously, the dealers have the ability to operate games and interact with customers in a company that, according to Bally's executives, makes customer service a priority. Obviously the dealers are able to get hired and maintain employment in a workplace where management hires, manages, disciplines, and reports in English. Indeed, because of the lack of showing that any bargaining unit employees cannot read enough English to cast ballots meaningfully, this case does not require reaching the issue of whether, among employees who cannot read English, foreign language accommodations are necessary.

In any event nothing in the record provides the slightest evidence that any employee language limitations suggested by Bally's interfered with the exercise of free choice by employees. Bally's claims to the contrary are speculation, backed by no evidence. "The Board has held in numerous cases that it requires more than mere speculative harm to overturn an election." *Transportation Unlimited*, 312 NLRB 1162 (1993). Moreover, Bally's extensive use of interpretation services in its preelection employee meetings significantly undercuts Bally's postelection speculation that employees did not understand balloting procedures. Prior to the election, each dealer was required to attend roughly five meetings, each lasting at least an hour, at which translation equipment in multiple languages was available. These meetings included information on balloting and election procedures and specific descriptions using a sample ballot about how to cast a ballot. Bally's decision to provide translated explanations of the election process further

[19] Bally's position on brief appears to be that the assertions about the limited English ability of hundreds of employees contained in Tartaglio's correspondence to the Region must be accepted as true. That is not the case. Indeed, Tartaglio's letters, which, in any event, are hearsay for purposes of the truth of matters asserted therein, are carefully phrased in a manner that reveals their foundational problems. For instance, he writes on April 27, that "*it continues to be Bally's position* that a substantial portion of our Dealer population do not fully read or understand English." His initial April 23 request to the Region stated that "[t]he majority of the employees listed below, *to our knowledge*, do not speak English well and do not read English." This phrasing reflects the author's lack of first-hand knowledge regarding these declarations.

erodes even Bally's speculative claim that the election process suffered from employee confusion or inability to participate meaningfully due to the Region's failure to translate the notices.

In sum, in this case the Regional Director exercised the discretion afforded her by the Board to determine whether translated notices were necessary for the integrity of the election. She decided they were not, in part, because of Bally's refusal, upon the Region's request, to provide substantiating information for its request for translated notices. The Employer has failed to show—either preelection in response to the Region's inquiry, or postelection through evidence presented at the objections hearing—that the use of only English notices of election resulted in any voter confusion or in any way adversely impacted the election. Accordingly, I overrule the Employer's Objection 1.

Objection 2: The Conduct of Union Observer Suisung Wong

Bally's dual rated floor person Sangita Patel served as an observer for Bally's in the representation election. (At the time of the election she was a dealer, but since the election has been promoted to dual rate floor person.) Her union observer counterpart was Suisung Wong. During their election shift, Patel and Wong sat side-by-side behind a table. Three other pairs of observers sat farther down the length of the table. The observers sat behind the table—described as about 4-feet wide—and checked in voters by last name as they came to vote. The Board's notice of election with a sample ballot was on the table in front of Patel and Wong facing voters, upside down to Patel and Wong. A sign hanging vertically in front of them on the table indicated that voters with last names beginning with T–Z were to register with Wong and Patel. Other sets of observers to Wong and Patel's right sat in front of signs designating other portions of the alphabet. When a voter approached the table one of the observers would ask for the voter's name, find it on the list of eligible voters, check off the name, and then the voter would be given a ballot by a Board agent and directed to the voting booth.[20] Wong sat to Patel's right. Standing off to the left, between the voting booths and Patel, was an agency employee, Field Examiner Mary Leach, who was in charge of running the election.

Patel testified that she noticed Wong[21] reaching across the table and pointing to the yes box on the sample ballot with the eraser end of his pencil when a voter would come into the room. Patel testified:

> I noticed the dealer next to me was—he—we both had a pencil in one hand and he was sitting next to me and the paper was little far away and he was pointing to the "Yes" box because the people's [a] little far and he kept pointing [at] it every time that he see dealers coming in and I observed that he kept doing it. I didn't t[ell] her right away, I observed him for more than 10 times and then I told Mary Leach, tried to get her attention to it that he's doing this and which is not right. So she went to him, told him he can't do it, took the paper and moved it away.

Patel testified that when Leach approached Wong, Wong denied Patel's accusation and told Leach that he was not pointing to the yes mark on the sample ballot but was pointing to the T–Z notice to show a voter which line they should get in. According to Patel, Leach moved the notice of election, and that "was [the] end of [the] story" and the issue was closed.

Wong also testified. For the most part his account of the voting procedures and events were the same as Patel's. But he vigorously disputed that he had pointed to the yes box on the sample ballot, or even to the notice of election. In accordance with Patel's testimony, Wong explained that after Patel told Leach that Wong had pointed to the ballot Wong protested, telling

Leach that he had pointed at the alphabet and not at the sample ballot. Wong explained that some voters, tired and coming from work, had gotten in the wrong line and he was pointing them to the correct line. Wong insisted that he pointed to the T–Z once, using the pen that he and Patel each had to check in voters. At that point Patel told Leach he was pointing to the yes box, Leach talked to him, moved the notice of election, and that was the end of it.

Patel and Wong's stories cannot be reconciled, although there is reason to believe that neither account is entirely accurate. Wong was a voluble, excitable witness, who, it seemed to me, felt unjustly accused of wrongdoing and was determined to protest his innocence regardless of the particular question put to him.[22] I do not accept his testimony that he only pointed once to the alphabet in an effort to direct voters to the right line. It is hard to imagine him sitting quietly if a voter appeared the least uncertain about what direction he was to go in.

Having said that, I am not convinced by Patel's testimony either. Patel testified with a great deal of certainty and assuredness, yet I was left wondering if the story had not hardened in her memory with greater clarity than there was at the time. Her testimony was that "more than ten times" Wong pointed to the yes box in the sample ballot with the rubber of his pencil. She declared (when I asked, although she had not stated this previously) that in each of the approximately 10 instances the eraser end of the pencil touched the paper of the sample ballot. I doubt this. First, and although it is not a particularly critical point, I wonder about these pencils (Patel was sure it was a pencil, and not a pen). Patel claimed both she and Wong had

[20] In accordance with the Employer's position (and the stipulated election agreement) Patel would challenge any voters who held dual rate floor positions. In accordance with typical Board procedures their ballots were segregated from those of unchallenged voters.

[21] Patel was not sure of the name of this union observer, she described an "Asian man" and was unsure of his name. However, Wong's testimony leaves no doubt that he was paired with Patel and that he is the union observer to whom she was referring.

[22] Wong spoke with a thick accent, and he often mixed up the pronouns he and she, especially when he spoke excitedly (which was often). But I do not believe he had any significant difficulty understanding the questions posed to him. On brief, Bally's contends that "Wong has a very limited understanding of English" and was "English-challenged" but I think that misstates the matter. If I agreed it might explain some of the agitated behavior of Wong on the witness stand, and his testimony that he did not meet with anyone to discuss his testimony in advance, when union counsel made clear that he did. But I do not think these problems were attributable to language difficulties.

pencils in their hand. Wong's testimony, that each observer held a pen (one blue, one red, with the union observers using one color and the Employer observers using another) is consistent with the testimony of other observers (see, testimony of Employer observer Kenneth Sarnes), and it is more plausible as method to check in voters. I do not suggest that Patel was "lying" about the pens and pencils, but if she was mistaken, and I find that she was, it begins to suggest that the certainty with which she presented her testimony warrants scrutiny. More important, I think that it is a reasonable question why, if Wong's conduct was so blatant, with his pencil (or pen) touching the sample ballot paper ten times, Patel waited for him to do it in the case of 10 voters before she raised it with the Board agent Leach, who was standing next to Patel. The answer is found, I believe, in Patel's response to this very question. She said, "[i]ts not like I waited, I wanted to make sure that's what [he wa]s doing." Patel waited, I believe, because it was not, in fact, obvious or clear what Wong was doing. It would have been had his pencil been touching the yes box or anywhere near it, but his pointing in the vicinity of the notice of election and T–Z designation (just beyond the notice of election) would not have been so clear. In other words, if Wong's actions had been as blatant as described by Patel, I do not believe she would have waited. She waited, by her own admission, because it was not clear that Wong was pointing to the yes box, or even to the sample ballot.[23]

Under these circumstances, I do not believe the evidence establishes that Wong engaged in the misconduct alleged, i.e., repeatedly pointing to the yes box on the sample ballot as voters approached the table. I find that he pointed in the vicinity of the sample ballot and the T–Z designation. I believe he did this more than once, perhaps as many as 10 times. I find he stopped when instructed to stop by the Board agent. I think that the evidence does not establish that he intended to or did point to the yes box on the sample ballot. There is no evidence that any voter was under that impression. Accordingly, I overrule the objection as unsubstantiated factually.

Objection 6, 8, 9: The Incident at Joseph Wanek's Home

Joseph Wanek is employed as a part-time dealer for Bally's. He testified to the following: on May 29, the Tuesday before the upcoming weekend election, at approximately 3:15 to 3:20 p.m., he was leaving his home to pick up his children from their school bus stop. Wanek testified that as he came out of his house a white pickup truck plastered with UAW stickers and placards pulled up to his house. Two men exited and asked him if his name was Joseph Wanek. Wanek asked, "who wants to know?" and the men presented ID's and said they were representatives of the UAW. One said he was from Buffalo and the other might have said he was from Pittsburgh. One of the men, who had a clipboard with him with a list of names, told Wanek that his name was on the list and "we're going around to find out how you're going to vote on Saturday for the vote. And we don't want to happen to you what happened to the dealers at . . . Hilton." Wanek understood this as a reference to the fact that the Hilton dealers voted down UAW representation. Wanek refused to tell them, and the one said, "[W]ell, you have to tell us." Wanek again refused to tell them, declaring that "that's my business and my business alone." The second individual then said, "I guess you have to go on the list." Wanek asked "what list" and the second organizer said, "[Y]ou're going to be one of the first ones to go." Wanek accused them of threatening him and ordered them off his property. They initially refused to leave, but then Wanek punched 911 into his cell phone, held it up to reveal the numbers, and threatened to call the police if they failed to leave. The men returned to their truck. Wanek left to pick up his children at the bus stop only about 100 yards away. While waiting at the bus stop Wanek said he looked in his mirror and saw that the UAW representatives were parked behind him at the bus stop. Then a police car happened to drive by and the truck left. At that point Wanek called Michael May and told him what had happened. The conversation was short, 2 minutes according to the cell phone records. In his testimony, May confirmed that Wanek called him "around Memorial Day . . . extremely upset that he had been visited by the UAW folks, and basically ran through a little bit of what occurred." May told him to "see me tomorrow and we'll talk about it then." In his testimony, May did not corroborate Wanek by offering details of the events conveyed by Wanek.

When Wanek went to work the next day he discussed the issue with a number of people. He testified that he "told every pit boss" about the incident. He also discussed it with voting-eligible dealers, although he could name very few with whom he spoke about the incident. He listed pit bosses, and then three individuals that he did not identify as bosses or dealers, and then one individual he identified as a dealer that he told.

Wanek's testimony was corroborated, to some extent, by a number of witnesses. Joe Cella, a Bally's pit manager, confirmed that on the Thursday before the election, May 31, Wanek and he were talking while waiting for customers at a game Wanek was dealing. Cella testified that Wanek told him that a couple of UAW representatives had come to his property in a pickup truck and made "threatening remarks" and acted in a "threatening manner." Cella reported that Wanek said he had been shown a list or paper and that when he asked the UAW representatives to leave they did not. Cella testified that Wanek had told him how he opened up his cell phone and dialed 911. Bally's pit manager, Sam Lagrotteria, testified that in the week prior to the election, Wanek approached him and "grabbed me and he says do you believe this shit. . . . He said these guys from the Union grabbed me the other day in front of my house, they were camped out in front of the house." Lagrotteria testi-

[23] Bally's explains Patel's delay in bringing Wong's conduct to the Board agent's attention as "consistent with the culture in which she was raised." I reject that wholly unsubstantiated explanation. Without reference or regard to the cultural norms of her native country, my impression of Patel was that she would not have been reticent or hesitant in the least in carrying out her observer duties. If she were to err, my impression is that she would be over not under zealous, and indeed, that may have been what happened here. Wong, describing Patel's work as an observer, said that "her actions is very quick and smart. . . . [S]he handled the book, the names, she's tough for everything." I suspect Wong is accurate on this. I find that Patel's delay in approaching Leach reflects the ambiguousness of Wong's actions, not any tendency (personal, cultural, or otherwise) on Patel's part to delay reporting perceived violations.

fied that Wanek told him that the union representatives wanted to know how he was voting in the election, that they did not want what happened at the Hilton to happen here, and that "they told him that he would be among the first to go, if they did take control." Lagrotteria testified that this conversation was between just Wanek and himself but that it occurred on the casino floor so there are always other people around. Lagrotteria testified that he did not know if anyone overheard the conversation. Lagrotteria discussed the incident with other pit bosses and floor people as "more or less cafeteria talk." Asked whether he discussed it with any people eligible to vote in the election (i.e., dealers) Lagrotteria said he could not recall doing so but that it was possible.

Dealer Joyce Kelly testified that on Saturday, June 2, while taking a smoking break with Wanek, he told her that the UAW had come to his house "and that they had threatened him, and he was not very happy about it. And that he had told them to get off his property." Kelly could not recall the nature of the threats or whether Wanek described them but she said, "I just know that in my mind it was that he had been threatened. I don't remember what he said specifically."

Wanek's testimony was sharply disputed by UAW Staff Official John Garvey. He testified that he and another UAW staffer made a house call to Wanek on May 30 (the day after Wanek said the visit occurred). Garvey testified that when he and the other UAW organizer, Scott Adams, knocked on the door there was no answer. As they started to leave Wanek came out of the house. According to Garvey, Wanek had his phone to his ear and motioned for them to wait. When he finished on the phone he said "I know who you are." Garvey said they explained that "we are just out talking to card signers to see if there are any last minute questions about the election." Wanek said that he did not have time to talk because he had to pick up his child. They said, "[T]hank you" and Garvey thinks Adams said, "Well I hope you do the right thing." According to Garvey, the entire encounter lasted about a minute. Garvey denied that there was any reference to the Hilton, that they asked Wanek how he would vote, or that they suggested he would be the first to go if the Union won. He denied having any such list. Garvey denied following Adams to the bus stop. Garvey denied seeing Wanek dial 911. Garvey denied seeing any police cars in the vicinity. He testified that they last saw Wanek as they were driving away and Wanek was getting into his car. Garvey said that he and Adams were driving a rented SUV and that there were no UAW insignia or stickers on it. He testified that he had a folder, but no clipboard, and wore a UAW shirt. Garvey testified that Wanek was on their list to visit because he had signed an authorization card in support of union representation but they had been unable to contact him by phone. In response to Bally's captive audience meetings, the UAW was making house calls and seeking to confirm that card signers were still supportive.

This is not an easy credibility determination. I detected no obvious problems with the demeanor of either Wanek or Garvey. Wanek's affidavit stated that the UAW organizers arrived in a van, not a pickup truck, as he testified, but he convincingly asserted that the affidavit was in error, and it is a small discrepancy in any event. It does strikes me as somewhat odd that Wanek failed to mention (or that counsel failed to adduce) that he had signed an authorization card, a fact that might be expected to set a different tone for the house visit than a "cold call" to an employee.[24] I do not accuse Wanek of overreacting, but one detects a certain vigor to his assertions and reactions that give pause. This is an employee who admits that he called the UAW to complain of "harassment" because they sent him—a card signer no less—union literature in the mail. This shows he is exquisitely sensitive to union solicitation, and not passive about asserting himself and his views. In assessing his credibility it is noteworthy, at least, that I believe the mere appearance of UAW representatives at his house would have been upsetting,[25] and therefore, raises the question of whether his account was influenced accordingly. I also note that there is no evidence that any other employee was subjected to such threats. It is possible, of course, that it occurred and was not reported, but if, as Wanek says he was told, Garvey had a list of such people, and was out visiting them, it seems likely that there would have been some evidence (or even rumors) about it. But there was not. It detracts from the plausibility of the incident if I must conclude that Garvey and Adams picked Wanek out of hundreds of employees to make this threat to him and only him.

Garvey's testimony was appropriate on its face. Yet, Garvey's testimony is not without its problems. Actually, it's not Garvey's testimony, but what is missing from the union side of the evidentiary conflict. Given the direct conflict between Wanek and Garvey's testimony, one does wonder why Adams, the other party to the conversation did not testify. No explanation was offered. Garvey did explain that he could not find another piece of evidence—his house call report—that, if filled out the way he claimed, would have corroborated his account of the encounter. However, the adequacy of the search seemed limited. He also testified that the secretary had typed in information on the report into the computer, but that he did not ask her or anyone else to print that information out. I hasten to add that, as far as I know or the record shows, none of this information was subpoenaed by the Employer, so the UAW was under no obligation to produce it, and by the same token, the Employer was free to subpoena it. But still, Garvey raised it and relied upon it in his testimony and this potentially corroborating piece of evidence was not introduced. That, and Adams unexplained absence raise questions.

Ultimately, it is unnecessary to resolve this very pointed credibility dispute. I have overruled all other objections advanced by the Employer. Assuming that this incident occurred the way Wanek explained, I do not believe that this single incident can be the basis to overturn an election of 1100 employees that was decided by a margin of well over 2 to 1.

"[T]he burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting

[24] Garvey's assertion that Wanek signed an authorization card was not, but easily could have been, rebutted by recalling Wanek. I credit Garvey's undisputed testimony on that score.

[25] Although, entirely unobjectionable under longstanding Board precedent, at least when unaccompanied by threatening or other coercive conduct. *Canton Carp's, Inc.*, 127 NLRB 513 fn. 3 (1960).

party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (internal quotations omitted). The burden of proof is particularly heavy where the margin of victory is overwhelming. *Avis Rent-A-Car System*, 280 NLRB 580, 581, 582 (1986); and *Millard Processing Services v. NLRB*, 2 F.3d 258, 264 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994). In evaluating whether a party's misconduct has "the tendency to interfere with employees' freedom of choice," the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Cedars-Sinai*, supra; *Taylor Wharton Division,* 336 NLRB 157, 158 (2001).

Here, we are considering a single incident with only meager evidence of dissemination. The Employer's prehearing evidence in support of the objections, cited by the Regional Director, indicates that the employee involved in this incident "states that the following day he told at least 100 of his fellow employees about this incident."[26] The evidence does not support this. Wanek told a lot of pit bosses. But the evidence shows that only a few, perhaps as few as two, perhaps five voting eligible dealers heard about the incident. One testified, and she remembered no details at all, just that Wanek felt he had been threatened. Assuming it occurred, the comments and actions of the UAW organizers constituted misconduct. But there were no threats of violence. The questioning of how Wanek was going to vote, was, by itself, of no consequence, although the insistence that he must reveal his intent was clearly improper. The expressed concern that Bally's dealers would end up like the Hilton dealers was (and was understood as) only the view of union advocates that it would be in the dealer's interest for the Union to win the election. The initial refusal to leave the property was quickly abandoned. The following of Wanek to the bus stop was also, quickly abandoned. The assertion that Wanek and others would be "the first to go" if the Union won the election is the nub of the objection. There is, however, no evidence that anyone else was subjected to this threat. In this case, and given the isolated nature of the misconduct, the limited dissemination to the voters (at least one of whom testified that she could not remember the nature of the threats made to Wanek), the large size of the bargaining unit and the substantial margin of victory, "it is virtually impossible to conclude that the election outcome has been affected." *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001) (citations omitted). This high standard, applied where, unlike in this case, the misconduct is the subject of an unfair labor practice finding, need not be, but is met here. Assuming, arguendo, the misconduct occurred, the objection should be overruled.[27]

[26] I have not considered this "statement" in terms of considering credibility, as I do not know the source of the Region's information and neither Wanek nor anyone else was questioned about it. I mention it only to point out that the dissemination did not live up to the billing it received in the Region's investigatory phase and which, presumably, was a part of the basis for ordering a hearing.

Recommendations

On these findings of fact and conclusions and on the entire record, I issue the following recommendations

The Employer's objections in the above matter should be overruled. As the tally of ballots shows that the majority of valid votes counted have been cast for the Petitioner, it is recommended that the Board certify the Petitioner as the collective-bargaining representative of employees in the appropriate unit.[28]

[27] I recognize that a majority of the Board views a union's threat to have an employee discharged as a threat a reasonable employee could believe, notwithstanding that employees work for the employer (not the union), and notwithstanding that the union's threat could not be carried out without the complicity of an employer, in this case one which has vigorously opposed the union. *Randell Warehouse of Arizona*, 347 NLRB 591, 594–594 (2006). But, at least, given these mitigating factors, the threat cannot be viewed as being equal in seriousness to an employer's threat of discharge, which, in isolation, in a large bargaining unit, with a decisive margin of victory, is not necessarily a basis for overturning an election. See *Werthan Packaging, Inc.*, 345 NLRB 343 (2005); *and Caron International, Inc.*, 246 NLRB 1120 (1979).

[28] Any party may, under the provisions of Secs. 102.67 and 102.69 of the Board's Rules and Regulations, file exceptions to this report with the Board in Washington, D.C., within fourteen (14) days from the issuance of this report. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. Exceptions must be received by the Board in Washington, D.C., by November 1, 2007.